

No. 10314

IN THE

United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT *12*

AL PIANTADOSI,

Appellant,

vs.

LOEW'S INCORPORATED, a corporation,

Appellee.

PETITION FOR REHEARING.

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Comes now Al Piantadosi, appellant in the above entitled cause, and presents this, his petition, for a rehearing of the above entitled cause and in support thereof respectfully shows:

I.

The court in its decision herein based the same largely on the legal principle that a copyright being similar to a patent should have applied the same rule so far as concerns the right of a co-owner to license a patent without the consent of his co-owner. This legal contention was not argued in any of the briefs and appellant desires to present argument on this point. There is a broad distinction between patents and copyrights set out in such cases as *Bobbs Merrill Company v. Straus*, 210 U. S. 339, 52 L. ed. 1086. One of the main distinctions is that the copyright statute provides only for the assignment of the right

as a whole, while the patent statute permits the patentee to subdivide his rights (*Bobbs Merrill v. Straus*, 147 Fed. 15, at 24).

II.

The court has overlooked the contention of appellant, but slightly argued in his brief (App. Br. p. 5), and not noticed in respondent's brief, that there is an issue here as to whether a license was made *before* the infringement took place. If the license was made after the infringement it would be no defense as it took place after the cause of action herein accrued.

An infringement took place on the making of the very first sound-record film footage that used the musical composition. The allegations of the Piantadosi affidavit states of his own knowledge that an infringement took place before May 1, 1941 [Tr. 68]; the affidavit of Piantadosi states as follows:

"That the infringement by defendants of the copy-right of said musical composition 'THAT'S HOW I NEED YOU' took place before May 1, 1941, by the manufacture and public exhibition and sale of the use of the film 'BARNACLE BILL,' such manufacture, sale and public exhibition taking place during the months preceding May, 1941."

The earliest date given by respondents' affidavits as to when the license was given by Feist to Loew's is fixed as May 1st, 1941, by the Olman affidavit [Tr. 54] and the first letter of Fred Raphael [Tr. 60] wherein Raphael confirms verbal quotations for the license as being given on May 1st and May 2nd.

The complaint charges that the first public showing of the film in theatres was about June 1, 1941 [Tr. 4]. To

make such showing it must have been a completed film and it is logical to assume that the making of the very first sound track using the infringed composition took place some considerable time before the film was completed, sold, and distributed to theatres.

The facts as to exactly the first date when the sound film was made and displayed to any part of the public are peculiarly within the knowledge of the respondent (defendant) and yet there is no denial in the record of the truth of Piantadosi's affidavit that the date of the first infringement was before May 1st, 1941, and a trial should be had to determine this issue.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the judgment of the United States District Court be upon further consideration reversed.

Respectfully submitted,

J. M. DANZIGER,
Attorney for Appellant.

I, J. M. Danziger, attorney for above named Al Piantadosi, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay, and is well founded.

J. M. DANZIGER,
Attorney for Appellant.

Dated June 25, 1943.

